

USAWC STRATEGY RESEARCH PROJECT

**PREEMPTION, “RED LINES,” AND INTERNATIONAL LAW: THE LEGALITY OF THE
2002 NATIONAL SECURITY STRATEGY AND A NUCLEAR NORTH KOREA**

by

Lieutenant Colonel William C. Brandt
United States Air Force

Colonel David L. Connors
Project Adviser

This SRP is submitted in partial fulfillment of the requirements of the Master of Strategic Studies Degree. The U.S. Army War College is accredited by the Commission on Higher Education of the Middle States Association of Colleges and Schools, 3624 Market Street, Philadelphia, PA 19104, (215) 662-5606. The Commission on Higher Education is an institutional accrediting agency recognized by the U.S. Secretary of Education and the Council for Higher Education Accreditation.

The views expressed in this student academic research paper are those of the author and do not reflect the official policy or position of the Department of the Army, Department of Defense, or the U.S. Government.

U.S. Army War College
CARLISLE BARRACKS, PENNSYLVANIA 17013

Report Documentation Page			Form Approved OMB No. 0704-0188		
Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.					
1. REPORT DATE 15 MAR 2006		2. REPORT TYPE		3. DATES COVERED 00-00-2005 to 00-00-2006	
4. TITLE AND SUBTITLE Preemption, 'Red Lines', and International law The Legality of the 2002 National Security Strategy and a Nuclear North Korea				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S) William Brandt				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) U.S. Army War College, Carlisle Barracks, Carlisle, PA, 17013-5050				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT Approved for public release; distribution unlimited					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT See attached.					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES 32	19a. NAME OF RESPONSIBLE PERSON
a. REPORT unclassified	b. ABSTRACT unclassified	c. THIS PAGE unclassified			

ABSTRACT

AUTHOR: Lieutenant Colonel William C. Brandt

TITLE: Preemption, "Red Lines", and International Law: The Legality of the 2002 National Security Strategy and a Nuclear North Korea

FORMAT: Strategy Research Project

DATE: 15 March 2006 WORD COUNT: 9,403 PAGES: 32

KEY TERMS: Prevention, Nuclear Weapons, Proliferation, Treaty Law, Customary Law

CLASSIFICATION: Unclassified

Since the mid-twentieth century, the Democratic People's Republic of Korea (DPRK) has actively pursued a nuclear program aimed at developing nuclear weapons. In early 2005, the DPRK publicly announced it possessed such weapons. Since then, multilateral talks have failed to produce a resolution to the threat, or seriously address the potential a nuclear DPRK poses for proliferation of nuclear systems and materials. This project focuses on the strategic concept of preemption as outlined in the 2002 *National Security Strategy of the United States (NSS)*, and the implications of dealing with the DPRK. It provides a brief history of North Korea's nuclear program, the ensuing negotiations, and describes where the issue presently stands. Because preemption opens a veritable "Pandora's box" of legal, moral, and international implications, the study explores international law and its views on preemption. It continues with an explanation of red lines, and the advantages and pitfalls of setting them. It suggests possible avenues the current administration might explore that respects international law, rallies support from allies, and sends unequivocal signals to Pyongyang. The paper concludes with proposed changes to the NSS, the rationale for the changes, and the conditions which must be met to implement them.

PREEMPTION, “RED LINES”, AND INTERNATIONAL LAW: THE LEGALITY OF THE 2002 NATIONAL SECURITY STRATEGY AND A NUCLEAR NORTH KOREA

In June of 1994, then President William Clinton sat in the oval office with his closest advisers, agonizingly contemplating preventive strikes against the Democratic People's Republic of Korea's (DPRK) nuclear facilities.¹ The DPRK had crossed a clear cut “red line” set by the administration when they began defueling the frozen nuclear reactor located near Yongbyon, North Korea.² Earlier in 1993, through a process of United Nations International Atomic Energy Association (IAEA) reviews of notable discrepancies in North Korean spent nuclear fuel reporting and U.S. satellite photography, the United States and the IAEA surmised Pyongyang had embarked on a nuclear weapons quest. Evidence indicated the North Korean regime had somehow built, managed, and hid an entire nuclear fuel cycle all on its own.³ Given Pyongyang's track record for ballistic missile development and proliferation to such countries as Iraq, Iran, Yemen, Pakistan, Libya, and Syria, it was not much of a leap to assume nuclear technology proliferation, and a dramatic shift in the balance of power on the peninsula would be the next steps for North Korea.⁴ As President Clinton and his advisers struggled to make a strategy decision, they were interrupted by a phone call from former President Jimmy Carter. Carter, in consultation with the Clinton administration, had flown to Pyongyang not as an official diplomat of the United States, but as a private citizen to meet personally with North Korean president Kim Il Sung.⁵ Carter advised President Clinton of a potential breakthrough to stop the escalating nuclear crisis. Over the next five months the ensuing negotiations survived the July 1994 death of “The Great Leader” Kim Il Sung, and narrowly averted preventive U.S. military action.⁶

Yet over the next eight years the fragile agreement would slowly erode, resulting in new troubles in 2002 and 2003. New problems, from new allegations, once more forced the United States and its regional partners into negotiations to subdue North Korean nuclear ambitions. While current negotiations have all parties hopeful of a settlement,⁷ much has changed since the last round of talks more than a decade ago. Preemption, once a tacit policy, had now taken center stage as the star concept of a new national security strategy aimed at a new threat.

This project focuses on the current U.S. strategic concept of preemption as outlined in the 2002 *National Security Strategy of the United States of America (NSS)*, and the implications of such a strategy in dealing with North Korea's nuclear weapons program. The study will provide a brief history of North Korea's nuclear program, including efforts to gain nuclear weapons, the ensuing negotiations between the DPRK, the United States, and its regional partners, and describe where the issue stands at present. Because the concept of preemption opens a

veritable “Pandora’s box” of legal, moral, and international implications, the paper will explore current international law and its views on preemption. The paper will continue with an explanation of red lines, and the advantages and pitfalls of setting them. It will suggest possible red lines the current administration might set that respect international law, can rally support from international partners, and send clear, unequivocal signals to Pyongyang. Finally, the project concludes with proposed changes to the NSS, the rationale for the changes, and suggested conditions which must be met to implement any changes.

Historical Background, 1980-1994

North Korean nuclear ambitions date back to the early 1950s when Soviet advisers began training DPRK scientists in nuclear technology. By 1965 with the help of the Soviet Union, the North had procured an extremely small, 2-MW(th) reactor which was subsequently upgraded to 4-MW(th).⁸ Over the next two decades, North Korea began efforts to mine uranium and graphite, and began experimenting with plutonium separation, a crucial step towards a nuclear weapons capability. Ultimately, a 5-MW(e) graphite-moderated, uranium fueled reactor was built at Yongbyon, North Korea. This reactor, similar to British designs of the time, was capable of producing plutonium suitable for weapons.⁹ Construction also began on a much larger 50-MW(e) gas-graphite reactor, and a host of facilities capable of separating plutonium from spent fuel rods. A small, highly enriched uranium (HEU) research reactor was built at a nearby university, and construction commenced on a 200-MW(e) gas-graphite reactor at Taechon.¹⁰ Of the four reactors, only the Yongbyon reactor and the HEU research reactor ever reached working capacity. The IAEA estimates the 5-MW Yongbyon reactor yields enough plutonium to produce roughly one nuclear weapon per year.¹¹

In 1985, after much pressure from the Soviet Union and promises to help provide four light water nuclear reactors (LWR), the DPRK signed the Nuclear Non-proliferation Treaty (NPT); however, due to a variety of reasons, public and private, Pyongyang refused to sign the IAEA safeguards agreement allowing the UN inspectors access to nuclear sites.¹² Following the collapse of the Soviet Union, the deal fell apart in late 1991 when the DPRK was unable to come up with funding for the reactors. At the same time, South Korean president Roh Tae Woo, along with U.S. president George H. W. Bush, jointly agreed to remove all nuclear weapons from the Korean peninsula. Subsequently, president Roh began a concerted effort at engagement with the North. A series of meetings on denuclearization ensued, culminating in the bilateral North-South Denuclearization Declaration (referred to as the Joint Declaration or NSDD). The key tenants of the agreement prohibited both sides from producing or procuring

nuclear weapons, and prohibited separating plutonium, enriching uranium, or possessing the facilities for doing so. Additionally both sides agreed to allow reciprocal inspections to verify compliance with the agreement; however, neither side has been able to agree on the place, time, and scope of the inspections and to date, none have taken place (North Korea officially renounced the agreement in May 2003).¹³

In 1992, North Korea finally yielded to the IAEA safeguards agreement and supplied the agency with the required reports of its nuclear holdings and facilities as required. The IAEA was finally allowed to inspect the facilities at Yongbyon after a seven-year delay in which the North Korean facilities went unchecked. Based on discrepancies in the reports, IAEA atmospheric sampling around the facilities, and U.S. satellite imagery, the IAEA concluded the DPRK had separated more plutonium than it had disclosed. North Korean refusal to permit additional inspections of two sites believed to house the missing materials resulted in heightened tensions, UN proposals for sanctions, and North Korean threats to withdraw from the NPT.¹⁴

In the summer of 1993, multilateral talks between the U.S., Japan, South, and North Korea aimed at finding a solution to the crisis produced an agreement that somewhat calmed the situation. While the agreement kept the DPRK in the NPT, continued disagreement with IAEA inspectors and failure of the Joint Declaration caused tensions to once more rise. Over the next year the DPRK discontinued operations at the Yongbyon reactor, and in the Spring of 1994, removed spent fuel rods without IAEA oversight, crossing a critical red line set by the Clinton administration.¹⁵ Lack of oversight made it impossible for the IAEA to accurately verify the amount of plutonium removed and sequestered. At an impasse, the Clinton administration sought UN sanctions and began considering preemptive strikes against the North Korean nuclear facilities.¹⁶ As a last hope and with the reluctant approval of the administration, former president Jimmy Carter flew to North Korea as a private citizen to engage Kim Il Sung on a solution.¹⁷ The two proposed an agreement along the lines of the August 1993 talks.¹⁸ Negotiations were seriously threatened with the death of Kim Il Sung that July, but ultimately the Agreed Framework, a bilateral U.S.-DPRK arrangement, was signed in October 1994. The Framework brought a much needed, though temporary, end to tensions.

The Framework called for the provision of two light-water nuclear reactors funded by Japan, South Korea, and the European Union at a cost of \$4.6B, and much needed energy incentives in the form of 500,000 tons of heavy fuel oil per year supplied by the U.S. at no cost to North Korea until the first new reactor came on line. Additionally, the deal furnished incentives to bolster the DPRK's floundering economy and provided the security guarantees North Korea had long sought. In return, North Korea agreed to follow all NPT safeguards and

allow IAEA inspectors access to the Yongbyon nuclear facilities to verify compliance. The DPRK also agreed to freeze plutonium production, cease nuclear weapons development, and dismantle all current nuclear facilities on a schedule commensurate with the building of the new LWRs. Even more, the North acquiesced to recommit to the Joint Declaration and promised to strengthen ties and work closer on regional issues.¹⁹

Historical Background, 1994-Present

Praised for its tactical success and loathed for its strategic failure, the accord halted North Korea's weapons grade plutonium production, but did nothing to thwart highly enriched uranium endeavors or ballistic missile proliferation.²⁰ Termed by some as the "best of only bad options at the time,"²¹ noted Korean expert Jasper Becker called the Framework "the most peculiar international agreement ever devised."²² Becker was perplexed that the United States would essentially reward the DPRK for their breaches of international nuclear security measures by offering them more nuclear reactors! In less than a decade the Framework eroded into a new crisis.

In reality, both sides contributed to the demise of the agreement. U.S. hardliners in Congress labeled the agreement "appeasement."²³ Funding for the promised fuel oil, subject each year to congressional approval, was often slow-rolled and/or reduced to the point where delivery was late or incomplete.²⁴ The U.S. also underestimated costs and overestimated partner contributions, delaying promised construction of the two reactors. To date, neither has been completed.²⁵ At the same time, the United States became focused on events in Bosnia, Kosovo, Somalia, and Haiti. In its relief at preventing a nuclear confrontation the likes of the 1962 Cuban Missile Crisis,²⁶ America essentially ignored the Korean Peninsula for a full eight years. Not surprisingly, North Korea presupposed the U.S. had reneged on its assurances, and was simply buying time for what it believed would soon be a North Korean regime collapse.²⁷ Under the impression it had received the short end of the agreement, and believing pledges were not being respected, the DPRK seized the moment to resume weapons development unchecked.²⁸

By early 2003, the United States ascertained the North had secretly developed highly enriched uranium and confronted the regime with that fact. Though not "technically" in violation of the Framework (since the prohibition was on "plutonium" separation), the U.S. viewed the production as a breach of the "spirit and intent" of the agreement.²⁹ In addition, it was a blatant violation of the Joint Declaration between the two Koreas—an agreement the North had promised to implement.

Predictably, as a result of U.S. accusations, the North pushed back. Other dynamics such as the “Evil of Axis” comment made by President Bush in his 2002 State of the Union Address,³⁰ the 2002 U.S. National Security Strategy which included preemptive force as a possible course of action, and the ongoing war on terror against Al-Qaeda and Iraq contributed to heightened tensions.³¹ North Korea subsequently withdrew from the NPT, expelled IAEA inspectors, refused further verification efforts, and renounced the Agreed Framework. Additionally, the North reactivated its formerly inoperative Yongbyon nuclear reactor, opening the opportunity for further plutonium production.³²

In August of 2003, negotiations commenced between China, North Korea, and the United States as the Three-Party Talks. With the inclusion of additional regional partners, South Korea, Japan, and Russia, talks continued as the Six-Party Talks with rounds in February and June of 2004. The talk’s publicly stated goal is the “verifiable denuclearization of the Korean Peninsula by peaceful means.”³³ Disappointingly, throughout 2004 the negotiations produced few substantial results. In early 2005, the DPRK officially announced it possessed nuclear weapons and refused to continue Six-Party talks. Intervention by Beijing helped convince Pyongyang to return and talks resumed in July of 2005.

On 19 September 2005 negotiators managed a breakthrough and announced a “Joint Statement of the Fourth Round” of talks. Notable for being the first to produce a tangible outcome, the agreement achieved significant statements of intent including the following:³⁴

- For the first time, the DPRK committed to abandoning all nuclear weapons and existing nuclear programs and returning, at an early date, to the Treaty on the Non-Proliferation of Nuclear Weapons and to IAEA safeguards
- The U.S. confirmed it had no nuclear weapons on the peninsula, no desire to place them there, and publicly guaranteed North Korea it had no intention of attacking with either nuclear or conventional weapons—the security guarantee North Korea has long sought
- In accordance with the 1992 Joint Declaration of the Denuclearization of the Korean Peninsula, the ROK will not receive or allow nuclear weapons on its soil; it verified no weapons currently exist
- The U.S. and its partners agreed to attempt to normalize relations and provide the DPRK assistance for both economic and energy needs
- The DPRK stated its right (in accordance with the NPT) to peaceful uses of nuclear energy. The other parties expressed their respect of that right, and agreed to discuss. *at an appropriate time*, the subject of providing LWRs

While seemingly a momentous breakthrough, the elation was short-lived. The North began a series of vehement verbal attacks on the statement and the U.S. the very next day. At the center of the attacks was the provision of LWRs, a promise twice before made to the North, but in the eyes of the DPRK, had been reneged on both times.³⁵ With trust in each camp running low, and in typical DPRK negotiating style, the North expanded its tactics in the opening days of December 2005.³⁶ Repeating demands for high-level talks with the United States regarding ongoing sanctions against its financial assets, the North attempted to tie the sanctions into the Six-Party agreement.³⁷ The United States has thus far refused, stating any dealings with financial assets is a law enforcement issue and separate from the nuclear talks.³⁸ As of the writing of this paper, the two sides are at an impasse. North Korea's nuclear program is still unchecked and frustration is riding high.

The Road to Preemption?

The United States remains firm that outside issues are not part of the agreement and holds steadfast to nuclear disarmament and verification by approved parties. It did agree “at an appropriate time” to entertain resuming construction of the LWRs. In a statement released September 19, 2005 from Beijing, chief U.S. negotiator Christopher Hill reiterated America's stance:

All elements of the DPRK's past and present nuclear programs – plutonium and uranium – and all nuclear weapons will be comprehensively declared and completely, verifiably, and irreversibly eliminated, and will not be reconstituted in the future. According to these principles, the DPRK will return, at an early date, to the NPT and come into full compliance with IAEA safeguards, including by taking all steps that may be deemed necessary to verify the correctness and completeness of the DPRK's declarations of nuclear materials and activities.³⁹

Mr. Hill clarified the term “at an appropriate time” by further putting forth that all nuclear weapons and all nuclear programs must be dismantled and verified to the satisfaction of all parties by credible international means, including the IAEA. He announced that once the DPRK had come into full compliance with the NPT and IAEA safeguards, had demonstrated a sustained commitment to cooperation and transparency, and had ceased proliferation efforts, the United States would address the nuclear reactor issue.⁴⁰ As noted Korean expert David Kang points out, this is typical of the stalemated relationship between the two countries. In the past, the North wanted security guarantees before dismantling weapons; the U.S. wanted the weapons dismantled before giving guarantees. Now, the North wants a LWR built before dismantling weapons; the U.S. wants the weapons dismantled before building the reactor.⁴¹ The more things change, the more they seem to stay the same.

While cautious optimism may be warranted, North Korea's past negotiating performance, the collapse of the 1994 agreement, and current indicators that while promising, still show signs of continued deceptive tactics, make it more than prudent for the United States to prepare other options in the event diplomacy fails. Should preemption be one such option?

Preemption, Prevention, and International Law⁴²

Preemption is defined by Anthony Clark Arend as "the use of military force *in advance* of a first use of force by the enemy (emphasis added)."⁴³ Preemption is differentiated from *prevention* in that preventive measures look to future developments that left unchecked would pose a significant threat to national interests and security. Both preemptive and preventive actions can be wide in scope and target military forces and weapons, the opposing regime, or enabling sources of national power such as information or economic capabilities.⁴⁴ Prevention is "cold blooded", designed to deal with problems *before* a crisis emerges; preemption is a desperate strategy employed in the heat of crisis.⁴⁵ Since prevention deals with eliminating an adversary's capability prior to reaching maturity, the U.S. essentially missed the opportunity to derail North Korea's nuclear train in 1993-1994. Since the DPRK now possesses nuclear weapons, any actions would be considered preemption. But is the use of preemption legal within the framework of the international community and in particular, international law?

Preemption, in various forms and for various rationales, has been around since the inception of war. History is ripe with examples: Spartan attacks on Athens in 431 B.C., Britain's War of Spanish Succession in 1703, Napoleon's 19th century march through Europe, the Arab-Israeli Six Day War in 1967, and the Israeli strike on Iraqi nuclear facilities in 1981 to name but a few. Even in the short history of the United States, preemption has often been a centerpiece of American diplomacy. Preemptive naval attacks on the Barbary Pirates beginning in 1801, ordered by then President Thomas Jefferson, are the first recorded case of such an American policy.⁴⁶ Andrew Jackson's 1818 foray into Spanish-held Florida to subdue the British, and preempt a possible repeat of the burning of Washington in 1814,⁴⁷ and the invasion of Mexico in the 1840s serve as early examples. In more recent years, actions were undertaken in Grenada in 1983, Libya in 1986, Panama in 1989, Iraq in 1991, and most recently Afghanistan and Iraq in 2002 and 2003 respectively. Several other preemptive actions against the Soviet Union in the early 1950s, Cuba and the Soviet Union in 1962, and most recently North Korea in 1994 were seriously contemplated but not carried out.⁴⁸ Prior to Operation Iraqi Freedom, U.S. preemptive actions barely raised a ripple of protest in the international community. So why now is the so called "Bush-Rumsfeld doctrine" such a highly contested issue amongst legal scholars? To

answer that question, an understanding of preemption and its accepted use in relation to international law is required.

International law is consensually agreed upon by states and derives its origins through one of two ways, treaties or custom.⁴⁹ Treaties, essentially international contracts, are signed, legally binding documents between two or more states. Since 1945, the most recognized and universally accepted treaty basis for modern international law is the United Nations Charter to which 191 nations are signatories.⁵⁰ Customary law derives its origin from norms drawn from state practices established over time. Not set down in writing, but adhered to in practice, the custom ultimately becomes an “authoritative state practice.”⁵¹ Diplomatic immunity is perhaps the most well known international law whose roots lie in customary beginnings.

When reviewing the legality of preemption, we must look at both treaty law and customary practice. As stated above, since 1945 the predominant written source for law as it pertains to the preemptive use of force is the United Nations Charter. The charter contains two commonly cited passages, Article 2(4) in Chapter 1, and Article 51 in Chapter 7. Article 2(4) states:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.⁵²

The purpose of Article 2(4) is to prohibit states from solving disputes through the use of force and instead, directs that problems be referred to the United Nations to be resolved through peaceful means. If military action is deemed necessary, it is authorized in accordance with the UN Charter, Chapter 7 entitled “Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.”

The exception to Article 2(4) is laid out in Article 51, and is the oft cited authorization for the use of preemptive force for self-defense. The Article states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations...⁵³

Several key concepts are apparent in the language of the charter. First, the right to self-defense is “inherent” meaning it predates the treaty, and is a customarily recognized precedent. Second, self-defense is permitted in response to “an armed attack.” Taken literally, this would suggest the respondent must receive the first blow before taking protective action; however, logic would dictate that no state should be required to stand and absorb an impending strike without taking the necessary steps at protection. If those steps are preemptive to an attack,

they become tantamount to “anticipatory self-defense” and must meet several criteria if the action is to be considered “legal.”⁵⁴

To understand those criteria, we must turn back to look at customary law. The legal and internationally accepted precedent for “anticipatory self-defense” stems from the *Caroline* case.⁵⁵ In 1837, British soldiers entered U.S. territory from Canada and boarded an American ship called the *Caroline*. The British, believing the crew was aiding Canadian forces opposed to British rule, set fire to the ship and loosed it over Niagara Falls. In the process, several American sailors were killed, prompting a myriad of U.S. diplomatic protests. For their part the British claimed they had acted preemptively in self-defense. In 1841, in response to the British assertions, then Secretary of State Daniel Webster drafted a diplomatic note to Lord Ashburton. Webster put forth that for the British to claim self-defense, they must be able to show that the “...necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment of deliberation...”⁵⁶ In other words, the British would need to show the threat posed by the *Caroline* was imminent, posed the gravest of dangers, and could not have been overcome by other, non-forceful means. In effect, a claimant of self-defense must be able to show the “necessity” of the act.⁵⁷ Webster’s letter goes further to propose that even if self-defense is warranted, the action must also be “proportionate” to the threat. Unable to meet the logical points laid out by Secretary Webster, the British eventually apologized for the incident. The two criteria, necessity and proportionality, are considered the standards for what constitutes an imminent threat necessitating anticipatory self-defense.⁵⁸

If the international community recognizes situations where preemptive action is acceptable, why has the Bush-Rumsfeld strategy created such a controversy? To answer that question, we must examine the 2002 National Security Strategy (NSS) and measure it against the criteria outlined above.

NSS Legality

In the past, the use of preemptive force was a matter between states. However, since the September 11, 2001 attacks on the World Trade Center, the possibility of non-state actors and “rogue states” obtaining, concealing, transporting, and using weapons of mass destruction is a reality the world community must face. The NSS acknowledged this and maintains “the nature and motivations of these new adversaries, their determination to obtain destructive powers hitherto available only to the world’s strongest states, and the greater likelihood that they will use weapons of mass destruction against us, make today’s security environment more complex and dangerous.”⁵⁹ The strategy’s basic premise is that the threat is greater now than

ever before, and *inaction* can make states even more vulnerable. The Bush administration maintains preemption has been used in the past, and it reserves the right to use it in the future. The NSS underscores the importance of world partners and multilateral cooperation, the necessity to think through preemption's use carefully, and asserts preemptive force has a place and time that should not be used "as a pretext for aggression."⁶⁰

At face value, the NSS would appear to conform to the basic principles of international law. Terrorism and rogue states unwilling to conform to the universally accepted norms of international relations clearly provide credible and imminent threats that necessitate a forceful response. And there is no reason to believe this new kind of threat will simply go away. Yet the strategy contains one key passage that has been the focus of serious legal debate. The NSS asserts the U.S. would be willing to act "even if uncertainty remains as to the time and place of the enemy's attack."⁶¹ Since international law demands the threat be "instant, overwhelming, and leaving no choice of means and no moment of deliberation" to justify preemption, this puts the NSS at odds with internationally accepted standards. The contention by the U.S. is that the severity, nature, and magnitude of the threat no longer permits the luxury of wait and see. As stated in the NSS, America "...can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first."⁶²

Whether the U.S.' stated policy of preemption, given the threat facing them today, is correct or not is part of an ongoing debate. Most legal scholars and the international community acknowledge the right to preemption. The majority of that same community is also of the opinion that the policy conforms only if it follows accepted rules and meets the conditions discussed earlier in this paper.⁶³ How do these rules apply to North Korea, a professed nuclear weapons state, and the way the U.S. must relate to them? What "red lines" might be set by the United States; red lines which speak to the international community and the DPRK, and leave no doubt as to what constitutes an imminent threat "leaving no choice of means, and no moment of deliberation?"

Policy Options

Almost immediately after taking office, President Bush set out to change the way American policy dealt with the proliferation of nuclear weapons. Past policies treated proliferation as "more of a political or policy challenge than as a security threat."⁶⁴ With a publicly stated end state of complete, verifiable, and irreversible dismantlement of the DPRK's

nuclear program, what are the possible policy options for the U.S. to pursue should the current round of diplomatic measures fail?

Perhaps the most important decision to make is to answer an extremely insightful question once posed by Deputy Secretary of State Richard Armitage: “What price is the United States willing to pay to disarm North Korean nuclear weapons?”⁶⁵ According to author Daniel Orcutt, four options present themselves.⁶⁶ They may stand alone, or be combined to allow a fuller range of responses. Measures span the full spectrum. Do nothing and accept North Korea as a nuclear power, or consider such an end state unacceptable and strike with preemptive military force. The two options in between include a range of “engagement” policies favoring a variety of soft, incentive-based measures, to more hard line, coercion-based approaches.⁶⁷

Given the Bush administration’s desired end state, doing nothing is an extremely unlikely response and achieves none of the stated goals. The action (or better stated, *inaction*) is inconsistent with our National Security Strategy and sends a clear message to those in the world considering similar options, that it is permissible to pursue nuclear weapons in a manner similar to North Korea—the United States will not respond. It sets a dangerous precedent.

Incentive-based diplomacy has a substantive appeal in that it is the least costly in terms of lives and dollars. In most any text you look at on the subject, “experts” are ready and willing to put forth grand visions of how to “engage” the North with an approach loaded with carrots and short on sticks. Not surprisingly, it is the most enthusiastically received option by most regional partners.⁶⁸ While such engagement strategies have been effective in the past, I would submit the approach must be balanced one. Incentives without punitive measures for noncompliance would leave the U.S. and its allies at the mercy of a regime that has a history of repeated blackmail, nuclear extortion, and deceptive negotiating tactics.⁶⁹ One need look no further than the broken 1994 Agreed Framework. With no punitive measures, the DPRK had little incentive to comply; its regime remained intact (number one objective), it secured aid, and it continued developing a nuclear weapons stockpile; the proverbial “having your cake and eating it too.” Given a shaky past negotiating history and deeply rooted suspicions, the U.S. remains intensely distrustful of North Korea. It will likely be extremely reluctant to offer the carrot without a stick or two.⁷⁰

The option of coercive diplomacy backed by military and/or non-military measures such as sanctions is a possibility, and is essentially the current negotiating policy of the U.S., though it draws much criticism from the other Six-Party partners.⁷¹ While such an approach appears reasonable on the surface, without incentives to show some sort of gain, North Korea is unlikely

to yield. Mistrust has forced both sides into a “give and take” negotiating style which provides incentives at a rate commensurate with DPRK capitulations. Along the way, the Kim regime has shown a remarkable ability to survive a wealth of manmade and natural disasters. Additionally, the DPRK regime leadership has shown a willingness to hoard humanitarian relief to ensure its own survival and the survival of an immense conventional army, while the civilian population suffers.⁷² For such reasons, punitive sanctions are most likely to affect only the civilian masses, much the same way well-intended sanctions against Iraq maligned the civilian population of that country.

With a significant portion of U.S. forces tied up in Iraq, as well as in a protracted war on terrorism, North Korea is unlikely to believe the U.S. can currently afford a conventional military strike to back up its threats. In the next year or years to come this might change, but for now the threat of military action without the means to back it up would be a hollow threat indeed. If the DPRK chooses to call a bluff, the consequences for U.S. policy in terms of credibility and precedent could be disastrous if a convincing response is not forthcoming. This opens the door to others attempting to emulate North Korean strategy. Of course any response, military or non-military, risks provoking North Korea into a full blown conventional war or worse yet, a nuclear exchange. North Korea has maintained its willingness to use nuclear weapons to turn “Seoul into a sea of fire” should the U.S. initiate actions against them.⁷³ Such threats should be considered within the realm of possibilities if this option or a form of it is pursued.

Full military preemptive action is just as dangerous. While it sends the desired clear message, it pushes the limit on the price the U.S. might be willing to pay to achieve the desired end state. It also pushes the limit South Korea might be willing to pay, for it would surely receive the worst of the initial exchange. Virtually every expert on the subject agrees the United States would prevail in direct military conflict with North Korea. Certainly this would assure the desired end state, but at what price along the way? Estimates given in 1994 by General Gary Luck, former commander of U.S. Forces Korea, put estimated costs at one million-one trillion; one million casualties including civilians and combatants from all involved, and one trillion U.S. dollars in damages, fiscal cost of war, and reconstruction expenditures.⁷⁴ Given the current state of U.S. military affairs, and waning public support both domestically and in Congress for current engagements, it would seem any military action akin to all out war would not only be impractical, but unfeasible as well. Add an expressed dissatisfaction amongst allies and mounting financial costs with no end in sight, and you have a recipe for disaster. The means available simply do not appear to support such a decision without drastically repositioning

already stretched-to-the-limit forces, accepting a much decreased focus in the Middle East, and asking Congress to drive a country already in the red, further down that path.

The United States also cannot ignore the fact that China may involve itself militarily should conflict begin. China has an outstanding 1961 agreement to come to the DPRK's aid should hostilities break.⁷⁵ In the 1994 crisis, China pledged almost 85,000 troops in support of North Korea. It also conducted extensive military-to-military consultations, and held very visible military exercises in the Shenyang military region of the Liaodong peninsula, opposite North Korea.⁷⁶ Again in 2002 and 2003, China conducted multiple exercises, continued military and political consultations, and initiated a rapid and extensive public affairs campaign designed to send clear signals to the U.S. not to undertake military operations.⁷⁷ Would the Chinese have entered a conflict had the United States called their bluff? We may never know, but based on the 1961 agreement and past actions, we should not dismiss the possibility should that road be traveled in the future.

Finally, one significant difference exists between the state of affairs in 1994 and the state of affairs today. In 1994, the DPRK did not yet possess nuclear weapons. The threat of conventional war was great, but lacked the possibility of escalating into nuclear war had the U.S. persisted with preventive actions. Today, conservative estimates place North Korea's nuclear arsenal at conservatively ten low yield nuclear weapons.⁷⁸ Any preemptive action now would have to weigh the risk of nuclear escalation.

In September of 2002, Secretary of Defense Donald Rumsfeld acknowledged the differences in dealing with the "haves" and "have-nots." When asked during a press briefing why the U.S. was contemplating action in Iraq but not in North Korea, Secretary Rumsfeld responded succinctly, the DPRK "had nuclear weapons."⁷⁹ In essence, Secretary Rumsfeld stated U.S. policy is not to use preemptive measures to disarm states already possessing nuclear weapons, but would consider such measures against those that did not.⁸⁰ If mere possession of nuclear weapons is not significant to warrant preemption, what is? To consider that question, a look at the DPRK's strategic intentions is necessary.

Strategic Intentions

Perhaps more than any other subject, North Korean strategic intentions and the corresponding desire for nuclear weapons remain a hotly debated topic. Opinions range the full spectrum. However, virtually every scholar on the subject has come to one shared conclusion: the number one vital interest that drives the DPRK is regime survival.⁸¹ A recent study of Korean

experts by Andrew Scobell of the U.S. Army's Strategic Studies Institute found that scholars generally place North Korean intentions into one of three distinct categories:⁸²

- Modest/Security -- aims are survival of the regime and a defensive mentality; economic recovery is important; desires to peacefully coexist with the South
- Ambitious/Benevolent -- regime survival still paramount but reform and economic opening are a possibility; will probably not give up nuclear program; desires a peaceful confederation with the South
- Ambitious/Malevolent -- aggressive and narcissistic; regime survival at all costs; nuclear weapons permits wide range of options, namely parasitic extortion to force concessions; desires unification of Korean Peninsula under communist rule, by force if necessary

Scobell concludes that insufficient data exists to say with any degree of certainty, but suggests Pyongyang's strategy most likely falls somewhere between the latter two options.⁸³

Another way to view the DPRK's need for nuclear weapons is through demonstrated past actions. Orcutt defines four possible strategic intentions with a simple to remember phrase: blackmail, black-market, deter, detonate.⁸⁴ He concludes the DPRK will continue to use nuclear weapons to blackmail the U.S. and its regional partners into providing long sought security guarantees, economic aid, and help with failing energy programs. Threatening the sale of weapons or their actual use, acts as an insurance policy against military action by the United States and its allies. If the recent September 2005 Six-Party joint statement of intent and the events following are any indication, Orcutt is virtually dead on.

Assuming the diplomatic courses of action outlined earlier fail--and preemptive action is the path chosen--given the extreme risk, high costs, and international implications, what red lines would trigger such a response? Since possession of nuclear weapons is insufficient, what would be worth answering Deputy Secretary Armitage's question? In the context of blackmail, black-market, deter, and detonate, are there possible red lines for U.S. policy with regards to North Korean actions? If there are such red lines, and they are cross-checked against the stated norms of international law, can the U.S. legally carry out a policy of preemption?

Setting "Red Lines"

"Red lines" can be thought of as the proverbial "line in the sand." They are points of no return where an adversary's acceptable extremes of behavior are defined. Red lines need not be enforced with military action, but setting a red line is akin to a threat; one that should be credible and backed up with the willingness to use force if necessary. The party threatening

should not be bluffing, and the receiving party should understand that it is not. When properly used, red lines can be an effective deterrent to an adversary and provide a wide range of options. However, an adversary's reaction is never guaranteed, and there is always a possibility the threat will be misconstrued or blatantly disregarded. Credibility is crucial.

In 1993, the red line set by the Clinton administration was North Korea defueling their frozen nuclear reactor at Yongbyon. As long as the reactor remained inactive and verifiably sealed with its nuclear fuel in place, the U.S. would persist with diplomatic efforts. If the DPRK began removing spent fuel from the reactor, thus gaining access to more plutonium, it would cross a red line triggering a multitude of response options to include a U.S. military strike.⁸⁵ The DPRK did in fact cross that red line, and the U.S. reaction included terminating negotiations and referring North Korea to the UN for sanctions.⁸⁶ A military response was close to fruition when diplomacy intervened. But as stated earlier, that was *before* North Korea possessed weapons. How has the problem now changed?

Based on Secretary Rumsfeld's statement, I have assumed possession of nuclear weapons alone is insufficient to trigger preemptive action. Looking at Orcutt's rationale for Pyongyang's weapons possession, blackmail, black-market, deter, and detonate, would any such actions be sufficient to trigger a preemptive strike?

Blackmail: Like setting red lines, blackmail is only effective if the intimidated consequences are credible, and the cost has sufficient meaning to the threatened state. Few, if any, believe North Korea can prevail in a conventional conflict. With regime survival the North's number one strategic objective, threatening conventional or military action as a consequence of noncompliance to blackmail would be tantamount to committing regime suicide. A more plausible blackmail scenario, one North Korea has played out many times over the past decade, would be to threaten continued noncompliant behavior if demands go unmet. Threatening to resume plutonium production and uranium enrichment, and removing spent fuel from reactors have been common past blackmail ploys to further negotiating objectives. Additional actions such as threatening withdrawal from the NPT, denying access to IAEA inspection teams, and refusing to begin or continue negotiations have also been commonly used techniques.

Analysis: Blackmail in itself does not meet the criteria laid out for permissive anticipatory self-defense. While it is a despicable and underhanded negotiating technique, there is no imminent threat, and no necessity that warrants a preemptive military response. This does not prohibit the administration from setting red lines for blackmail, and indeed both the Clinton and Bush administrations have done so, but nothing in blackmail would suggest preemption is an acceptable U.S. response.

Black-market Nuclear proliferation is at the very heart of the U.S. National Security Strategy. As stated in the NSS, “We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning.”⁸⁷ It is hard to conceive of a threat greater, or harder to defend against, than that of nuclear weapons falling into the hands of individuals who know no borders and follow no rules. The North Korean economy is in shambles. To make ends meet, the DPRK has resorted to illicit activities such as counterfeiting and drug trafficking, as well as selling ballistic missiles.⁸⁸ The price brought by one nuclear weapon from terrorists willing to pay virtually anything to get it, might pose a temptation too great for the DPRK to pass up.

Analysis: The threat posed by a terrorist with a nuclear weapon most certainly meets the criteria for preemptive action. In the hands of someone willing to use them, the threat is indeed extreme, imminent, and of such proportion that nothing short of swift and deadly action would most likely stop it. The option is to wait until the weapon is detonated on U.S. soil, and that would simply be unacceptable—for the U.S. or for any state. I would propose two potential targets in a black-market scheme meet the preemptive criteria in accordance with international law: a terrorist with a nuclear weapon, and the state that provided it to them. If setting red lines for preemptive military action, it should be made unequivocally clear to North Korea that the confirmed sale or transfer of any nuclear technology to any terrorist, or terrorist group, will result in swift and decisive military action.

Deter: North Korea has repeatedly made claims in official news releases and in traditional New Years Editorials, that it possesses nuclear weapons to deter what it feels is an aggressive United States.⁸⁹ After President Bush referred to North Korea by name as one of the three states forming the “axis of evil,” and subsequently invaded Iraq in April 2002, Kim Jong Il disappeared from public view for more than six weeks.⁹⁰ Given past history, the consistent rhetoric coming from official DPRK sources, and deeply embedded mistrust between the two countries, it is not unreasonable to assume North Korea truly sees the military might of America as a genuine threat. Wound within the deterrent effect of nuclear weapons is the somewhat “irrational” rationality inherent in North Korean actions. While it is easiest to explain North Korea’s behavior as having no logic, Scobell points out this could not be farther from the truth. Experts he reviewed on the subject all shared the same conclusion: Kim Jong Il and the North’s leadership are rational actors who use unpredictable behavior as a form of deterrence designed

to keep an adversary off balance.⁹¹ The unpredictability of actions combined with nuclear weapons forms a level of uncertainty which is every bit as much a deterrent as the weapons alone.

Analysis: Possession of nuclear weapons as a deterrent, if that is indeed the true objective of the DPRK regime, does not meet international criteria for preemptive action. The professed North Korean rationale for development of nuclear weapons is defensive in nature with the aim of protecting the state and ensuring regime survival. Deterrence, designed to convince an adversary not to pursue an action yet to be taken based on showing him that taking such action would not be in his best interests, is essentially a peaceful attempt to solve a problem.⁹² If the intent is peaceful, then in accordance with international law there exists no threat satisfactory to warrant preemption.

Detonate: The actual use of nuclear weapons for forceful reunification of the peninsula, as a force multiplier, or as a last ditch effort to ensure regime survival are all possible detonation scenarios involving nuclear weapons. Actual use of a weapon against the United States, or any of its allies or regional partners, would certainly result in a severe response; however, it would be just that, a *response*. The action would not be preemptive, it would be retaliatory. For preemptive strike consideration, detonation would most likely occur in one of two ways. Either North Korea detonates a weapon in an actual nuclear test, or as in the “black market” situation, a nuclear weapon is detonated by an outside actor, and the signature of the weapon is then traced back to the DPRK. In the latter scenario, the detonation would be proof of proliferation and handled as in that scenario. But a verified nuclear test by North Korea would provide the United States a formidable response challenge. While the DPRK is believed to have tested nuclear components such as triggers and explosive cores as early as 1982, to date no test of a completed weapon has occurred.⁹³ Is the threat posed by a nuclear test significant enough to legally permit preemptive military action?

Analysis: The U.S. made many attempts to dissuade Pakistan from developing and testing nuclear weapons throughout the 1990s. Ultimately, all attempts failed and in May 1998, Pakistan announced it had conducted five nuclear tests in response to a similar number conducted by India.⁹⁴ Over time, sanctions placed on Pakistan were lifted, sales of U.S. military equipment resumed, and Pakistan is now a trusted partner in the Global War on Terror. Just as possession of nuclear weapons is insufficient to justify a response, I would propose testing weapons poses no greater threat. While it certainly demonstrates capability and may be part of a black-mail attempt, unless credible evidence exists that North Korea is actually planning to *employ* nuclear weapons, there exists insufficient evidence to support a legal claim of self-

defense. While the threat is certainly implied, without credible information, there is no case for imminent use.

Recommendations: Preempt or Prevent?

Are there actions the U.S. can take in the future that might prevent facing a situation like North Korea again? Currently, Iran is rapidly attempting to become a member in the nuclear club. With its threats to “wipe Israel of the map”⁹⁵ and increasingly antagonistic rhetoric, the scenario is eerily similar to the North Korean script. Is now the time to apply all elements of national power to try and head off a potential crisis? Is *preventive* action a better policy, one which might avert a replay of the circumstances that resulted in two decades of consternation for the U.S. and South Korea?

In this author’s opinion, the current NSS advocating preemption is insufficient to address the threat posed by states already possessing nuclear weapons. Legally, in all but the most extreme circumstances, preemption violates the premises of international law and risks nuclear escalation. Is there a better policy? I would suggest the U.S. needs to retain preemption as a strategic concept within the NSS, but not to be used when doubt remains as to time and place of attack. Having doubt opens the nation to legal attack throughout the international community, and raises questions, suspicions, and concerns among potential allies. Refining the concept to include the accepted standards of necessity and proportionality would bring the policy within legal standards. I would suggest taking the concept one step further.

The better time to deal with nuclear threats is when they first emerge, adhering to a selective policy of *prevention*. This allows for a wider range of red lines and opens the door for a more selective use of military force should that become necessary. The rationale for prevention is fourfold.

First, the facilities required to process both uranium and plutonium are more readily identifiable. Enriching uranium requires a dedicated facility that gives off signature trace elements, and plutonium can only be created through irradiating uranium in a reactor. Targeting and surgically striking such facilities is easier and more likely to take them off line, hindering or precluding further efforts. Once nuclear weapons are developed, they are too easily dispersed and concealed making the certainty of destruction through military strikes virtually impossible.

Second, since prevention deals with capabilities *before* they become threats, the possibility of nuclear escalation is removed. In addition, if strikes are carried out at an early point, the enrichment and/or nuclear facilities never have the chance to become operational. This would minimize collateral damage as well as reduce the amount of radiation released into

the environment. If the strikes are delayed until enrichment facilities are operational, or once nuclear fuel has been irradiated in a reactor, the amount of radiation released following an attack is significantly higher.

Third and perhaps most importantly, if attacks are conducted before weapons grade material is produced, the opportunity to proliferate nuclear equipment and/or material is removed. This eliminates a significant threat to national security by keeping such weapons out of the hands of the non-state actors and terrorists that seek them.

Lastly, based on the above reasons, preventive self-defense might be an easier case to sell to the international community. The cost in both lives and dollars is less, proliferation is purged, and while the chance of conventional escalation exists, any possibility of nuclear escalation is eliminated. Contrasted with preemption, prevention is a better policy if diplomacy fails and military force becomes necessary.

Regardless of whether a state resorts to preemptive or preventive military force, and this author argues the latter, several steps should be taken before such action can be viewed as legal in the eyes of the international community. The first step would require an internationally accepted policy for dealing with states seeking to develop a nuclear weapons program. That policy should explicitly define the legal precedent for the use of force. I would submit the definition must be tied to the concept of imminent threat as currently defined in international law, but expanded sufficiently to address the unique threats posed by non-state actors and terrorists. Such a definition would help address American fears that the current law inadequately addresses those concerns.

Next, since international law derives its precedence through one of two ways, treaties or custom, one or both of these methods is the proper vehicle for change. Amending the UN charter is the most logical means to change international law through treaty. The UN is the one international body that speaks for the world and is the one entity with the internationally recognized authority to sanction force by one state upon another. A combined effort through the UN Security Council, the additional nuclear-capable states, and those states with nuclear capability but without weapons, would be an appropriate body to work the issues. By utilizing the UN, the legal guidelines and circumstances authorizing when force is appropriate could be explicitly specified. Once part of the UN charter, it would become international law.⁹⁶

Acceptance through customary practice would be much more difficult and rest on shakier ground. In essence, to become accepted international law, states would have to partake in preventive action without international objection. Over time, the lack of objection would imply consent by default.⁹⁷ Consent subsequently equals custom, and custom produces law;

however, this process would take place over a period of many years, making it subject to objection at any point. For that purpose alone, treaty amendment is a better vehicle to induce change.

Third and tied to an explicit definition for the legality of preemptive/preventive force would be the requirement to wield preemptive/preventive force multilaterally. Once defined, actions taken should rely on the international system, through the UN, to address and arbitrate all concerns. Unilateral action taken outside the UN mandate would subject the offending party to international condemnation and result in UN censure, sanctions, or other such measures.

A final step would require preemptive/preventive force be exercised only as a last resort. The full weight of the international community would be applied using all the elements of national power short of military force, while maintaining the latter for credibility. If implemented properly, an adversary would be given every opportunity to comply, knowing full well armed force is available and legally sanctioned to back up demands.

Conclusion

Is the strategic concept of preemption within the NSS legal? Yes, if it is wielded within the criteria accepted by the international community, demonstrates necessity, and acts according to the standard of proportionality. Is it rational to extend preemption to non-state actors? Not only is it rational, but it is necessary. Terrorists and other non-state actors have made themselves a viable threat to the security of the United States and its allies. Not dealing with them would in my opinion be irrational and irresponsible.

The biggest question and one that raises considerable debate is, is it legal to strike even if uncertainty remains as to the time and place of an enemy attack as put forth in the NSS? The answer would be it depends. What is the threat? Is the threat from a state such as North Korea or non-state actor such as Al-Qaeda? If a state actor, this author feels only two instances warrant a preemptive strike: conclusive evidence of a pending attack (conventional or nuclear) such that no doubt remains, or proliferation of nuclear materials or weapons to a non-state actor or terrorist. Only those two instances pose a grave enough threat.

If a non-state actor, the circumstances change. If doubt remains as to time and place of attack, but conclusive evidence exists that a non-state actor possesses WMD, then the threat could be considered imminent and anticipatory self-defense permissible, in accordance with international law. Of course, obtaining conclusive evidence and subsequently locating the threat would be a challenge in itself. In any case, preemption when dealing with nuclear weapons is a tricky business.

Following through with a policy of preemptive action against North Korea, a state already in possession of nuclear weapons, is a very thin line to walk—in many ways. Legally, making the case that a threat is indeed “instant, overwhelming, and leaving no choice of means, and no moment of deliberation” is extremely difficult. Of the situations we looked at, this author feels only one “red line” (short of an actual pending attack) is sufficient to necessitate preemptive military action against the DPRK--proliferation of nuclear components and/or processed nuclear materials to a terrorist organization or other non-state actor. Only the “black-market” scenario meets the legal standards for preemption. Possession, nuclear testing, and blackmail fail to meet the international law criterion to legally permit anticipatory military action.

In the case of North Korea, the U.S. must weigh several critical questions prior to any strike. Will the DPRK respond with conventional forces, nuclear weapons, or both? If they respond with nuclear weapons, can the weapons be defeated before striking their intended targets? Whether a conventional or nuclear response, is the U.S. willing to risk “one million/one trillion” to get the job done? Is South Korea willing to risk the same? Certainly any road taken by the U.S. to Pyongyang will have to go through Seoul first. The ROK stands to lose the most as it faces down hundreds of artillery pieces and hundreds of thousands of troops within short range of the capital.⁹⁸ Massive casualties, devastation to Seoul and other major population centers, and crippling economic effects all point to the conclusion the South would be extremely reluctant to support any military action in all but the most dire case.

In the years ahead, the United States must take a proactive role with the United Nations and willing partners. Efforts to develop a legal global strategy, including preventive action as one of many strategic options, should be a priority for the international community. Additionally, the U.S. must further refine and articulate its policy within the NSS if it is to conform to existing or future international law. Only then will states seeking to acquire nuclear weapons understand the global populace will not tolerate their actions. Waiting until the threat has matured is too late. In short, it all comes back to Deputy Secretary Armitage’s question: “What price is the United States willing to pay to disarm North Korean nuclear weapons?”

Endnotes

¹ Joel S. Witt, Daniel B. Poneman, and Robert L. Gallucci, *Going Critical: The First North Korean Nuclear Crisis* (Washington D.C.: Brookings Institution Press, 2004), 210-211.

² Witt, Poneman, Gallucci, 193, 229.

³ Jasper Becker, *Rogue Regime: Kim Jong Il and the Looming Threat of North Korea* (New York: Oxford University Press, 2005), 165.

⁴ Becker, 165.

⁵ Daniel J. Orcutt, *Carrot, Stick, or Sledgehammer: US Policy Options for North Korean Nuclear Weapons*, Institute for National Security Studies Occasional Paper 56 (Colorado Springs: United States Air Force Academy, 2004), 16.

⁶ Witt, Poneman, Gallucci, 227.

⁷ Department of State, "The Six-Party Talks and the North Korean Nuclear Issue" (Washington D.C., October 6, 2005); available from <http://www.state.gov/p/eap/rls/m/2005/54430.htm>; Internet; accessed 25 November 2005. Statement Before the House International Relations Committee made by Christopher R. Hill, Assistant Secretary for East Asian and Pacific Affairs

⁸ Michael May et al., *Verifying the Agreed Framework* (Stanford University: Center for Global Security Research, and Center for International Security and Cooperation, 2001), 15. North Korea normally classifies their reactors with a rating relative to the electrical generation capacity (e.g. 20-MW(e), meaning 20 megawatts electrical). The IAEA normally classifies reactors via their thermal rating, a more accurate rating for estimating their plutonium-making capability (e.g. 20-MW(th), stated as 20 megawatts thermal). In the simplest terms, the thermal rating is roughly three to four times the electrical rating, and one megawatt thermal yields approximately one-half gram of plutonium per day.

⁹ May, 15-16.

¹⁰ May, 16.

¹¹ May, 15. Under normal operating conditions, the Yongbyon 5-MW(e), 20-MW(th) reactor would produce approximately 10 grams of ²⁴⁰Pu per day, or approximately 3.65 kilograms per year. At higher operating rates, the reactor could easily produce twice that amount resulting in 7-8 kilograms of weapons grade plutonium annually. For reference, the U.S. nuclear weapon detonated at the Trinity Site was 6 kilograms.

¹² The International Institute for Strategic Studies (IISS), *North Korea's Weapons Programmes: A Net Assessment* (New York: Palgrave MacMillan, 2004), 7.

¹³ Ibid., 5.

¹⁴ Ibid., 5.

¹⁵ Witt, Poneman, Gallucci, 193.

¹⁶ Witt, Poneman, Gallucci, 210-211.

¹⁷ Witt, Poneman, Gallucci, 203.

¹⁸ Witt, Poneman, Gallucci, 227.

¹⁹ Wikipedia, The Free Encyclopedia, "Agreed Framework," available from http://en.wikipedia.org/wiki/Agreed_Framework; Internet; accessed 27 November 2005.

²⁰ Orcutt, 18.

²¹ Orcutt, 18.

²² Becker, 168.

²³ Becker, 169.

²⁴ Becker, 169.

²⁵ Orcutt, 16-17.

²⁶ Becker, 166.

²⁷ Frontline, "Kim's Nuclear Gamble: Interview with Ashton Carter," available from <http://www.pbs.org/wgbh/pages/frontline/shows/kim/interviews/acarter.html>; Internet; accessed 25 November 2005. Carter was Assistant Secretary of Defense for International Security Policy from 1993-1996 and the senior advisor to former Secretary of Defense William Perry on the Clinton administration's 1999 North Korea policy review.

²⁸ Ibid.

²⁹ Becker, 18.

³⁰ George W. Bush, "The President's State of the Union Address," 29 January 2002, linked from *The White House Home Page* available from <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>; Internet; accessed 7 January 2006.

³¹ Orcutt, 1.

³² Debra A. Miller, ed., *Is North Korea a Global Threat?* (Detroit: Greenhaven Press, 2005), 52-55.

³³ Department of State, "Joint Statement of the Fourth Round of the Six-Party Talks Beijing, September 19, 2005," available at <http://www.state.gov/r/pa/prs/ps/2005/53490.htm>; Internet; accessed 1 December 2005.

³⁴ Ibid.

³⁵ Barry Schweid, "Official Impatient With North Korea Talks," *Associated Press*, 2 Dec 2005; available from <http://www.salon.com/wire/ap/archive.html?wire=D8E8DDS81.html>; Internet; accessed 2 December 2005.

³⁶ For an overview of DPRK negotiating trends, see Yong-Sup Han, "North Korean Behavior in Nuclear Negotiations," *The Nonproliferation Review* 7, no. 1, (Spring 2000), 45. For a more detailed analysis, see Scott Snyder, *Negotiating on the Edge: North Korean Negotiating Behavior* (Washington D.C.: United States Institute of Peace Press, 1999). While frustrating, such rhetoric is not unexpected, and is probably the continuation of

commonly-used DPRK negotiating tactics. In his paper, Dr. Yong-Sup Han outlines three of the most commonly relied upon tactics by DPRK negotiators. First, North Korea treats negotiations differently when dealing with the U.S. versus other key parties, often feigning a contrived internal struggle between hard line military leaders and “concerned” diplomats. Such tactics are typically designed to reduce U.S. pressure for results by intimating that the DPRK diplomat will be removed and replaced by a more hard line military negotiator. Second, it is not uncommon for the North to create a “crisis” designed to bring the parties to the table. The contrived crisis stays just under the level requiring substantive response, but is generally enough to force parties to address the issue at the bargaining table. Lastly, once at the table, it is typical for North Korea to attempt to expand the negotiations by dividing issues into minute subdivisions in an effort to squeeze every bit of concession it can.

³⁷In widely released news statements, the Bank of China and two banks in Macau are under U.S. scrutiny for possible connections to North Korea's funding network and could face sanctions. Additionally, Washington has accused eight North Korean companies of acting as fronts for sales of banned technology. The U.S. also recently placed sanctions on eight companies it suspected of involvement in counterfeiting and money-laundering on behalf of North Korea. Pyongyang has denied those claims, as well as accusations that North Korea produces high quality counterfeit \$100 bills known as “supernotes.”

³⁸“North Korea Repeats Demand for Financial Talks With US,” *Reuters*, 2 December 2005; available at <http://abcnews.go.com/International/wireStory?id=1368369>; Internet; accessed 2 December 2005.

³⁹ Department of State, “North Korea—U.S. Statement,” available at <http://www.state.gov/pa/prs/ps/2005/53499.htm>; Internet; accessed 1 December 2005.

⁴⁰ Ibid.

⁴¹ Victor D. Cha and David C. Kang, *Nuclear North Korea* (New York, Columbia University Press, 2003), 43.

⁴² As defined, both *preempt or preemption*, and *prevent or prevention* have very different meanings. Yet each results in the first use of force, ahead of that used by an adversary. Since the first use of force is at the heart of the international law argument, the word preempt will be used synonymously with prevent when discussing this topic since the law is applicable to each.

⁴³ Anthony Clark Arend, “International Law and the Preemptive Use of Military Force,” in *Reshaping Rogue States: Preemption, Regime Change, and U.S. Policy Toward Iran, Iraq, and North Korea*, ed. Alexander T. J. Lennon and Camille Eiss (Cambridge: The MIT Press, 2004), 19.

⁴⁴ Lawrence Freedman, “Prevention, Not Preemption,” in *Reshaping Rogue States: Preemption, Regime Change, and U.S. Policy Toward Iran, Iraq, and North Korea*, ed. Alexander T. J. Lennon and Camille Eiss (Cambridge: The MIT Press, 2004), 38-39.

⁴⁵ Freedman, 39.

⁴⁶ Gerald W. Gawalt, "America and the Barbary Pirates: An International Battle Against an Unconventional Foe," available from http://memory.loc.gov/ammem/collections/jefferson_papers/mtjprece.html; Internet; accessed 12 December 2005.

⁴⁷ James Chase, "History Preempts Bush Doctrine," *Los Angeles Times*, 7 March 2004, sec. M, p. 5 [database on-line]; available from ProQuest; accessed 11 December 2005.

⁴⁸ Ibid.

⁴⁹ Arend, 20.

⁵⁰ *Charter of the United Nations*, available from <http://www.un.org/aboutun/charter/>; Internet; accessed 10 January 2006.

⁵¹ Arend, 20.

⁵² UN Charter, Chapter 1.

⁵³ UN Charter, Chapter 7.

⁵⁴ Arend, 21.

⁵⁵ Dietrich Murswiek, "The American Strategy of Preemptive War and International Law," Institute of Public Law, University of Freiburg, Germany (March 2003), 6 [database on-line]; available from ProQuest; accessed 12 January 2006.

⁵⁶ Murswiek, 6. Arend, 21.

⁵⁷ Arend, 22.

⁵⁸ Arend, 22.

⁵⁹ George W. Bush, *National Security Strategy of the United States of America* (Washington D.C.: The White House, September 2002), 13.

⁶⁰ Ibid., 15.

⁶¹ Ibid., 15.

⁶² Ibid., 15.

⁶³ In researching this section, I found very few who supported the NSS as it is currently written. Most agreed there was sufficient legal precedent to support preemptive military action under Article 51 and the *Caroline* case, with varying interpretations of what constitutes legal. But the majority opinion suggested that the policy as written opens the door for the U.S. to act whenever, wherever it sees fit. The fear registered by most of the scholars was that if left unchecked and unchallenged, preemption would by default become the customarily accepted norm and thus international law. The result would be states acting on the flimsiest of rationale and ultimately, a total disregard for the principles outlined and agreed to in the United Nations Charter.

⁶⁴ Robert G. Joseph, "The Bush Administration Approach to Combating the Proliferation of Weapons of Mass Destruction," 7 November 2005; available from <http://www.state.gov/us/rm/56584.htm>; Internet; accessed 4 December 2005. Robert G. Joseph is the Under Secretary for Arms Control and International Security. The above referenced document is a transcript of his November, 2005 remarks to the Carnegie International Nonproliferation Conference in Washington D.C.

⁶⁵ Orcutt, ix.

⁶⁶ Orcutt, 11. Orcutt actually outlines three of the four options, dismissing "doing nothing." The options are not original to negotiating and foreign policy, and have been used by states throughout the ages. Similar options were discussed in Army War College lessons during AY06.

⁶⁷ Orcutt, 63.

⁶⁸ Orcutt, 32-33.

⁶⁹ Becker, ix-xiv.

⁷⁰ Becker, 170.

⁷¹ Paul Kerr, "How the Other Four Parties View the Six-Party Talks," *Arms Control Today*, 34,5; Military Module (June 2004): 32.

⁷² Orcutt, 36.

⁷³ Becker, 261.

⁷⁴ Becker, 166.

⁷⁵ Becker, 170, 260.

⁷⁶ William C. Triplett II, *Rogue State: How a Nuclear North Korea Threatens America* (Washington D.C.: Regnery Publishing, 2004), 78.

⁷⁷ Triplett, 78-79.

⁷⁸ May, 86. If North Korea has removed and processed all of the fuel taken from the Yongbyon reactor in 1994, the plutonium would be enough to produce roughly 10-20 small yield (10 kiloton) weapons.

⁷⁹ Strategic Forecasting, "Rumsfeld Indicates Nuclear Status Key to Pre-Emption Policy," Strategic Forecasting, Inc (17 September 2002); [database on-line]; available from Stratfor; accessed 11 October 2005.

⁸⁰ That thought is probably not lost on Iran as they continue substantial efforts to develop nuclear weapons, but by American intelligence estimates, have not yet succeeded.

⁸¹ In virtually every text and article referenced on the subject, regime survival was listed as the number one objective of the DPRK. Noted experts researched for the purposes of this

paper include Stephen Kim, Don Oberdorfer, David Kang, Victor Cha, Bruce Cummings, Selig Harrison, Andrew Scobell, Daniel Orcutt, William Triplett, Robert Gallucci, and Jasper Becker among others.

⁸² Andrew Scobell, *North Korea's Strategic Intentions* (U.S. Army War College, Carlisle, PA: Strategic Studies Institute), 10-11.

⁸³ Ibid., 28.

⁸⁴ Orcutt, 8.

⁸⁵ Witt, Poneman, Gallucci, 193, 229.

⁸⁶ Witt, Poneman, Gallucci, 406.

⁸⁷ George W. Bush, *National Security Strategy of the United States of America* (Washington D.C.: The White House, September 2002), 14.

⁸⁸ Becker, 164, 261.

⁸⁹ *Korean Central News Agency Home Page*, available from <http://www.kcna.co.jp/index-e.htm>; Internet: accessed 6 January 2006. While considered "rhetoric", Scobell points out a careful analysis of such statements along with official documents and new reports can yield insight, and identify key trends and thought processes (Scobell, 15). For this paper, I examined all New Year Editorials from 1997 through 2006, and numerous official news releases, concentrating on periods when the U.S. and DPRK relations were especially tense. Several key characteristics were revealed. The DPRK has consistently maintained a need to build a large conventional force and develop nuclear weapons. The continuous reference to defending the state from the aggressiveness of the United States and its "imperialist" policies demonstrates a concerted effort to deter what it feels is a genuine threat.

⁹⁰ Michael O'Hanlon and Mike Mochizuki, *Crisis on the Korean Peninsula: How to Deal With a Nuclear North Korea*, (New York: McGraw-Hill, 2003), 33.

⁹¹ Scobell, 12.

⁹² Daniel L. Byman, Matthew C. Waxman, and Eric Larson, *Air Power as a Coercive Instrument* (Santa Monica: Rand, 1999), 10.

⁹³ Witt, Poneman, Gallucci, 406. Becker, 166.

⁹⁴ Andrew Koch, "Center for Defense Information Fact Sheet: Pakistan's Nuclear Tests," 28 May 1998; available from <http://www.cdi.org/issues/testing/pak1.html>; Internet; accessed 12 January 2006.

⁹⁵ Steven Erlanger, "Israel Wants West to Deal More Urgently With Iran," *New York Times*, 13 January 2006, sec. A, p. 8.

⁹⁶ Arend, 20.

⁹⁷ Arend, 22.

⁹⁸ O'Hanlon and Mochizuki, 63-68.